THYE HIN ENTERPRISES SDN BHD

v.

DAIMLERCHRYSLER MALAYSIA SDN BHD

COURT OF APPEAL, KUALA LUMPUR
MOHD GHAZALI YUSOFF JCA
NIK HASHIM JCA
LOW HOP BING J
[CIVIL APPEAL NO: K-02-124-2004]
28 JULY 2004

ARBITRATION: *Procedure - Interlocutory injunction - Application for interim injunction to preserve status quo pending arbitration of dispute - Whether proscribed by s. 34 Arbitration Act 1952 - Whether s. 34 precludes application of Arbitration Act 1952 in arbitration proceedings held under United Nations Commission on International Trade Law Arbitration Rules 1976 and Rules of the Regional Centre for Arbitration at Kuala Lumpur*

CIVIL PROCEDURE: *Injunction - Interim injunction - Arbitration - Application for interim injunction to preserve status quo pending arbitration of dispute - Whether proscribed by s. 34 Arbitration Act 1952 - Whether s. 34 precludes application of Arbitration Act 1952 in arbitration proceedings held under United Nations Commission on International Trade Law Arbitration Rules 1976 and Rules of the Regional Centre for Arbitration at Kuala Lumpur - Considerations for grant of interlocutory injunction - Bona fide serious issue to be tried - Justice of the case - Discretionary considerations*

This was an appeal from the decision of the High Court upholding the defendant's preliminary objection and dismissing the plaintiff's application for an interim injunction to maintain the *status quo* of the parties pending the resolution (by arbitration) of the contractual dispute that had arisen between the plaintiff and the defendant. Pursuant to a dealership agreement entered into earlier, the defendant (distributor) had appointed the plaintiff as a dealer for its Mercedes Benz vehicles in the states of Perlis and Kedah. The said agreement had provided that any dispute arising therefrom as between the parties shall be referred to arbitration at the Regional Centre for Arbitration at Kuala Lumpur ('the RCAKL'). The central issue that arose for decision before the justices of appeal herein was whether the grant of the injunction sought was proscribed by s. 34 of the Arbitration Act 1952 ('the 52 Act') on the basis

that it (s. 34) precludes the application of the 52 Act in respect of arbitration proceedings conducted under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur.

Held (allowing the plaintiff's appeal)
Per Mohd Ghazali Yusoff JCA delivering the judgment of the court:

[1] The learned judge did not take the plaintiff's application through the well-worn steps of an enquiry along the venerable lines of *Keet Gerald Francis Noel John v. Mohd Noor & Ors, videlicet*: (i) whether the facts presented disclosed a *bona fide* serious issue to be tried; (ii) whether the justice of the case laid in the plaintiff's favour; and (iii) whether there were any 'discretionary considerations' against the grant of the interim injunction sought. This omission had afflicted the decision of the learned judge. Indeed, the very issue whether s. 34 of the 52 Act is an absolute bar to all injunctive relief in such arbitration proceedings was in itself a serious question to be tried. It was not open to the learned judge to conclude, at that stage of the plaintiff's application and as a preliminary issue, that s. 34 of the 52 Act precluded the grant of the interim injunction sought. (pp 596 c-h, 597 a-h, 598 a, e-h & 599 a-c)

[2] Section 34 of the 52 Act "only excludes interference with the arbitration [process] itself" and "has no application to cases where interim relief is urgently required". Consequently, "the grant of interim relief pending the outcome of an arbitration [proceeding] held at the RCAKL is not prohibited by s. 34 of the 52 Act". (pp 598 h, 599 a-g & 600 a-c)

[Decision of learned judge upholding defendant's preliminary objection overturned; plaintiff's application remitted to High Court.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang membenarkan bantahan awal defendan dan menolak permohonan plaintif untuk mendapatkan injunksi interim bagi mengekalkan *status quo* pihak-pihak sementara menunggu penyelesaian (melalui timbangtara) suatu pertelingkahan kontraktual yang berbangkit di antara plaintif dan defendan. Ekoran satu perjanjian wakil jualan yang dimeteri sebelum ini, defendan (pengedar) telah melantik plaintif sebagai wakil jualan bagi kenderaan Mercedes Benz mereka bagi negeri-negeri Perlis dan Kedah. Perjanjian tersebut memperuntukkan bahawa sebarang pertelingkahan yang berbangkit darinya di antara pihak-pihak hendaklah dirujuk kepada timbangtara di Pusat Timbangtara Serantau di Kuala Lumpur ('PTSKL'). Isu utama yang berbangkit di hadapan yang arif hakim-hakim rayuan di sini adalah

sama ada pemberian injunksi yang dipohon itu dilarang oleh s. 34 Akta Timbangtara 1952 ('Akta 1952') atas alasan bahawa seksyen tersebut telah menyingkir pemakaian Akta 1952 berkaitan dengan prosiding timbangtara yang diadakan di bawah Kaedah-Kaedah Timbangtara Perdagangan Antarabangsa Suruhanjaya Bangsa-Bangsa Bersatu 1976 mahupun di bawah Kaedah-Kaedah Pusat Timbangtara Serantau di Kuala Lumpur.

Diputuskan (membenarkan rayuan plaintif)
Oleh Mohd Ghazali Yusoff HMR menyampaikan penghakiman mahkamah:

[1] Yang arif hakim tidak mengendalikan permohonan plaintif melalui cara biasa suatu siasatan dengan berdasarkan lunas-lunas *Keet Gerald Francis Noel John v. Mohd Noor & Ors* yang dihormati, untuk menentukan: (i) sama ada fakta-fakta telah menyerlahkan suatu isu serius *bona fide* yang harus dibicarakan; (ii) sama ada keadilan kes berpihak kepada plaintif; dan (iii) sama ada terdapat 'pertimbangan-pertimbangan bersifat budibicara' terhadap pemberian injunksi yang dipohon. Kegagalan ini telah mencemarkan keputusan yang arif hakim. Malah, isu sama ada s. 34 Akta 1952 melarang sepenuhnya pemberian relif injunksi dalam prosiding timbangtara sedemikian adalah suatu isu serius yang perlu dibicarakan. Adalah tidak terbuka bagi yang arif hakim untuk menyimpulkan, di peringkat permohonan plaintif tersebut dan sebagai suatu isu awalan, bahawa s. 34 Akta 1952 telah melarang pemberian injunksi interim yang dipohon.

[2] Seksyen 34 Akta 52 "hanya melarang campurtangan terhadap [proses] timbangtara itu sendiri" dan "tidak terpakai kepada kes-kes di mana relif interim amat diperlukan". Oleh yang demikian, "pemberian relif interim sementara menunggu keputusan suatu [prosiding] timbangtara yang diadakan di PTSKL tidaklah dilarang oleh s. 34 Akta 52".

Keputusan yang arif hakim membenarkan bantahan awal defendan diakas; permohonan plaintif dikembalikan ke Mahkamah Tinggi.]

Case(s) referred to:
Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(foll)***
Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd & Ors [1998] 3 CLJ 275 CA ***(dist)***
Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd [1984] 2 CLJ 13; [1984] 1 CLJ (Rep) 346 FC ***(foll)***

Legislation referred to:
Arbitration Act 1952, ss. 25(2), 34
Specific Relief Act 1950, ss. 20(1)(g), 54(f)

Other source(s) referred to:
Sundra Rajoo, *Issues Related To Arbitrations Conducted Under The KLRCA Arbitration Rules,* [2003] 3 MLJ xlix

For the appellant - Cyrus Das (Shamsul Baharin Manaf & T Jegadeeson); M/s Shook Lin & Bok
For the respondent - DP Naban (Bahari Yeow); M/s Lee Hishamuddin

[Appeal from High Court, Alor Setar; Civil Suit No: 22-03-2004]

Reported by Gan Peng Chiang

JUDGMENT

Mohd Ghazali Yusoff JCA:
This appeal is directed against the order of the High Court at Alor Setar dismissing the appellant's application for injunctive relief. The dispute in this case revolves around a dealership agreement ('the said agreement') dated 10 January 2003 entered into between the appellant, as dealer, and the respondent, as general distributor, wherein the respondent appointed the appellant to be a non-exclusive dealer in the State of Kedah and Perlis for the sale and service of new Mercedes Benz passenger cars, vans and transporters including new genuine parts and accessories distributed and supplied by the respondent.

It is common ground that the said agreement provides for all disputes between the parties to be referred for arbitration to the Kuala Lumpur Regional Centre for Arbitration ("the Centre"). Article 17 of the said agreement provides:

Governing Law and Dispute Resolution

(1) This Agreement is made in and will be construed and governed in all respects in accordance with the laws of Malaysia.

(2) All disputes, controversies or claims arising from the interpretation, performance or non-performance of this Agreement or any and all transactions related to this Agreement (including, but not limited to, the validity, scope and enforceability of this provision, or disputes under rights granted pursuant to law) shall be finally and completely resolved by arbitration in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules as at present in force. The appointing authority shall be the Secretary-General of the Permanent Court of Arbitration at The Hague. The place of arbitration

shall be Kuala Lumpur Regional Centre for Arbitration, where its rules and the UNICITRAL rules shall apply. The language to be used in the arbitral proceedings shall be English.

It is not in dispute that steps have already been taken to have the dispute referred to arbitration at the Centre. Accordingly, s. 34 of the Arbitration Act 1952 ("the Act") applies to the case. That section reads:

(1) Notwithstanding anything to the contrary in this Act or in any other written law but subject to subsection (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur.

(2) Where an award made in an arbitration held in conformity with the Convention or the Rules specified in subsection (1) is sought to be enforced in Malaysia, the enforcement proceedings in respect thereof shall be taken in accordance with the provisions of the Convention specified in subsection (1) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, as may be appropriate.

(3) The competent court for the purpose of such enforcement shall be the High Court.

Pending the commencement of the arbitration, the appellant filed a writ in the High Court at Alor Setar and by way of summons-in-chambers sought interim injunctive relief to preserve the status quo ("the application"). Although the foot of the writ oddly claims a declaration that the respondent's termination of the said agreement is invalid, a question eminently one for the arbitrators to decide, the interim injunction sought for seeks the preservation of the *status quo* pending the decision of the arbitrators.

Prior to the hearing of the application, the respondent's solicitors gave written notice to the appellant's solicitors informing the latter that they will be raising a preliminary objection which was framed as follows:

> Please be informed that we intend to raise a preliminary objection before the Court that by virtue of Section 34 of the Arbitration Act 1952, the interim relief sought by the (Appellant) in this case is not available to the (Appellant) as the law under which it is sought does not apply to an arbitration held under the UNICITRAL Arbitration Rules and the Kuala Lumpur Centre for Arbitration.

After hearing submissions of counsel for the appellant and respondent, the learned judge upheld the preliminary objection raised by the respondent and dismissed the summons without entering into the merits of the application for interim relief. This is an appeal from that decision.

Before this court, the only issue is whether the learned judge adopted the correct approach to the application before him. The respondent argued the learned judge was right in doing so on the face of s. 34 of the Act. The appellant argued the learned judge was wrong. We are in agreement with the appellant.

The steps to be taken by a judge hearing an application for an injunction at the interlocutory stage have been set out by this court in *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293. In that case, Gopal Sri Ram, JCA said (at pp. 305-306):

> To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
>
> (1) he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;
>
> (2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, *inter alia*, the relative financial standing of the litigants before him. If

after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in Cheng Hang Guan. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgement the several factors that weighed in his mind when arriving at his conclusion.

In the instant case, the learned judge did not take the application before him through these stages despite the binding nature of the decision in *Keet Gerald*. This, in our view, flawed the learned judge's decision. The issue whether s. 34 of the Act bars interim injunctive relief altogether is in itself a serious question to be tried. We would agree with the contention of the appellant's counsel that it was not open to the learned judge at this stage to have finally and conclusively decided the question. In *Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd* [1984] 2 CLJ 13; [1984] 1 CLJ (Rep) 346, it was argued that no injunction could lie by reason of s. 20(1)(g) of the Specific Relief Act 1950 read with s. 54(f) of that Act. In delivering the judgment of the Federal Court, Abdul Hamid CJ (Malaya) (as he then was) said:

Mr R.R. Chelliah, counsel for the appellant urged us to consider two points of law to which he said the learned Judge only made casual reference in his grounds of judgment but neither dealt with nor applied them, (a) the appellant's contention that by virtue of section 20(1)(g) of the Specific Relief Act, 1950 which is reproduced hereunder:

> 20(1) The following contracts cannot be specifically enforced:
>
> ...
>
> (g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date;

the contract is clearly one that cannot be specifically performed, and (b) that in view of section 54(f) which we also reproduce hereunder:

> 54. An injunction cannot be granted:
>
> ...
>
> (f) to prevent the breach of a contract the performance of which would not be specifically enforced;

this contract cannot be specifically enforced. It is submitted that if permanent injunction cannot be granted it follows that interim injunction cannot also be granted. Reference is made to *Vethanayagam v. Karuppiah & Ors*.

On the facts of that case, s. 20(1)(g) of the Specific Relief Act 1950 plainly applied. Nevertheless, Abdul Hamid CJ (Malaya) (as he then was) said:

> While we appreciate that these questions are crucial, indeed they are the main grounds upon which the appellant's case rests, we do not, however, see the necessity at that stage for the learned Judge to decide on these difficult points of law.
>
> Suffice for the learned Judge to decide, and this he did, that there are serious questions that have arisen for trial. While we agree that there are serious questions of law we are also of the view that these questions are relevant for consideration in determining the grant or otherwise of an interim injunction but the question is should it be the Court's business to resolve these serious and difficult questions of law at that stage of the litigation? We think not.

Thus, in *Si Rusa*, the statutory provisions did not permit the grant of injunctive relief but yet the Federal Court held that that very issue was a serious question to be tried. We are of the opinion that a similar approach should have been taken in the instant case by the learned judge. It is to be noted that s. 34 of the Act only excludes interference with the arbitration itself. It has no

application to cases where interim relief is urgently required. In this context it is useful to quote from the article entitled *"Issues Related To Arbitrations Conducted Under The KLRCA Arbitration Rules"* by Sundra Rajoo [2003] 3 MLJ xlix, where the learned writer says (at p. lv):

> While the decision in Jati Erat (*Jati Erat Sdn Bhd v. City Land Sdn Bhd* [2002] 1 CLJ 346) is correct on the plain reading of s. 34, it is unfortunate in another way as it extends the principle of non-interference by the courts in arbitrations conducted under the KLRCA Rules to situations where the relief sought from the court is not supervisory in nature but merely for interim preservation. This is especially so as art 26.3 of the KLRCA Rules specifically provides that a request for interim measures to a judicial authority shall not be deemed incompatible with an agreement to arbitrate. It would seem that the KLRCA rules recognize the need for court intervention in certain situations, particularly in emergency cases, and have made suitable provisions in this connection. Court intervention, by way of ordering interim measures of protection, is essential in urgent situations particularly when granting relief is beyond the jurisdiction of the arbitral tribunal or where the arbitral tribunal has not yet been constituted. The court in *Third Chandris Shipping Corp v.* Unimarine SA [1979] QB 645 observed that it only takes a telephone call or telex message which could, within seconds of the service of the writ, put all liquid assets out of reach of the creditor.
>
> The object of interim measures of protection is to support the arbitration by making it effective. This is to say, the court may intervene in support of arbitration by granting interlocutory injunctions. In this connection, in *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] 1 All ER 664, speaking for the House of Lords, Lord Mustill candidly stated that 'none of the terms of the Arbitration Act of 1950, apply to foreign arbitrations and that since these include s. 12(6), the power conferred by s. 12(6)(h) to grant an interim injunction is not available to the court in respect of foreign arbitrations such as the present'. He then authoritatively stated the law: '... the purpose of interim measures of protection ... is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.' Their Lordships then upheld the proposition that interlocutory measures could be taken against a defendant within the jurisdiction of the English courts to protect the foreign arbitration.

We are entirely in agreement with the views of the learned writer. In our judgment, the grant of interim relief pending the outcome of an arbitration held at the KLRCA is not prohibited by s. 34 of the Act. We have read the judgment of this court in *Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd & Ors* [1998] 3 CLJ 275 which was referred to by learned counsel for the respondent and find that case readily distinguishable from the facts of the instant case. In that case the appellant was seeking to invoke s. 25(2) of the Act which empowers the High Court to revoke the authority of an arbitrator or to restrain arbitration proceedings where the arbitrator is not impartial or where fraud is involved, something that is clearly prohibited by s. 34.

For these reasons, we would allow this appeal, set aside the order made by the learned judge and remit the application to the High Court at Alor Setar to be heard on the merits. The respondent must pay the costs of this appeal and the costs in the court below. The deposit is to be refunded to the appellant.